NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. IGNACIO ESTEBAN RIMER, Appellant.	2 CA-CR 2009-0100 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20073959

Honorable Gus Aragón, Judge
Honorable Jane L. Eikleberry, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Laura P. Chiasson — Tucson
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

E S P I N O S A, Judge.

¶1 After a jury trial, appellant Ignacio Rimer was convicted of one count of illegally conducting an enterprise, one count of kidnapping, one count of sexual assault,

and one count of aggravated assault. The trial court sentenced him to a combination of concurrent and consecutive prison terms totaling 23.75 years. On appeal, Rimer argues the court erred in denying various motions and contends there was insufficient evidence to support his conviction of illegally conducting an enterprise. For the following reasons, we affirm.

Background

¶2 "On appeal, we view the facts in the light most favorable to upholding the verdict and resolve all inferences against the defendant." *State v. Klokic*, 219 Ariz. 241, n.1, 196 P.3d 844, 845 n.1 (App. 2008).[1] At trial, the state presented evidence that Rimer and his half-brother, codefendant Howard McMonigal, conducted an on-going methamphetamine and stolen-property business out of McMonigal's residence. The two utilized a number of women to assist in conducting the business, and when they did not perform as ordered, the women were punished in various ways, including rape. After their arrest, Rimer and McMonigal were charged with illegally conducting an enterprise as well as various counts of kidnapping, sexual assault, and aggravated assault. Following a lengthy jury trial, Rimer was convicted and sentenced as outlined above. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

[1]The statement of facts in Rimer's opening brief is approximately thirty-nine pages long and contains much redundant and unnecessary information. We remind counsel that a statement of facts should only include matters "relevant to the issues presented for [our] review." Ariz. R. Crim. P. 31.13(c)(1)(vi).

Discussion

Denial of Motion to Disqualify

¶3 Rimer first argues the trial court erred in denying his motion to disqualify the Pima County Attorney's Office from prosecuting the case, alleging there was a "conflict of interest" that "deprive[d him] of fundamental fairness." To the extent we understand his argument, he maintains the county attorney's office should have been disqualified from prosecuting his case because two women, W.H. and M.K., were alleged to be both co-conspirators and victims. After a hearing, the court denied Rimer's motion. We review the denial of a motion to disqualify for an abuse of discretion. *State v. Williams*, 136 Ariz. 52, 57, 664 P.2d 202, 207 (1983).

¶4 Rimer has failed to offer any apposite or persuasive authority demonstrating the trial court abused its discretion in denying his motion to disqualify the county attorney's office from prosecuting his case based on W.H.'s and M.K.'s status as both victims and co-conspirators. Neither the statutes granting rights to victims nor the cases upon which Rimer relies support his position and, to the extent they are applicable here, they instead inform a contrary conclusion. *Compare* A.R.S. §§ 13-4401 through 13-4440 ("Crime Victims' Rights" statutes providing certain protections for victims, including notice of proceedings from prosecutor's office, § 13-4409(C), and right to confer with prosecutor regarding disposition of offenses, § 13-4419(A)), *with State ex rel. Romley v. Superior Court*, 181 Ariz. 378, 381-83, 382, 891 P.2d 246, 249-51, 250 (App. 1995) (even in light of Victims' Bill of Rights and Crime Victims' Rights statutes,

disqualification of county attorney's office not required because "a prosecutor does not 'represent' the victim in a criminal trial" and "victim is not a 'client' of the prosecutor"); *see also Villalpando v. Reagan*, 211 Ariz. 305, 308, 121 P.3d 172, 175 (App. 2005) ("A defendant does not state a claim for a violation of his due-process rights . . . unless the conflict is so severe as to deprive him of fundamental fairness in a manner 'shocking to the universal sense of justice.'"), *quoting Oshrin v. Coulter*, 142 Ariz. 109, 111, 688 P.2d 1001, 1003 (1984); *Bicas v. Superior Court*, 116 Ariz. 69, 74, 567 P.2d 1198, 1203 (App. 1977) (disqualification proper when attorney may have acquired information in former representation related to subject matter of subsequent representation). Accordingly, we conclude the court did not abuse its discretion in denying Rimer's motion to disqualify the Pima County Attorney's Office.

Denial of Motion to Sever

¶5 Rimer next argues the trial court erred in denying his motion to sever his trial from McMonigal's, contending the joint trial had a harmful "rub-off" effect on him, which occurs when "the jury's unfavorable impression of the defendant against whom the evidence is properly admitted influence[s] the way the jurors view the other defendant." *State v. Lawson*, 144 Ariz. 547, 555, 698 P.2d 1266, 1274 (1985). "The test for severance based on rub-off is whether the jury can 'keep separate the evidence that is relevant to each defendant and render a fair and impartial verdict' as to each." *State v. Van Winkle*, 186 Ariz. 336, 339, 922 P.2d 301, 304 (1996), *quoting Lawson*, 144 Ariz. at 556, 698 P.2d at 1275. "[R]ub-off warrants severance only when the defendant seeking

severance establishes a compelling danger of prejudice against which the trial court cannot protect," and "[w]e will not overturn the trial court's decision absent a clear abuse of discretion."[2] *Id.*

¶6 In support of his argument, Rimer argues that three women connected with the enterprise and who had been abused by McMonigal, J.F., W.H., and L.K., would not have testified at his trial had he been tried separately. He contends their testimony about McMonigal's abuse made M.K.'s testimony, who alleged that both Rimer and McMonigal had assaulted and raped her, more believable, especially in light of similarities between McMonigal's assault of M.K. and those of the other women, particularly his depriving victims of their clothing, imprisoning them in his trailer, and shaving their heads. Rimer also points to allegations that a witness was winking at McMonigal during trial and asserts that other prejudicial evidence concerning

[2]Rimer additionaly appears to argue the trial court improperly denied his motion to sever count one from other charges. However, as the state points out, Rimer waived this argument by failing to renew his motion to sever "during trial at or before the close of the evidence" as required by Rule 13.4(c), Ariz. R. Crim. P. In addition, he also has failed to argue or support it adequately on appeal, and thus has waived it on this basis as well. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellate brief shall contain "citations to the authorities, statutes and parts of the record relied on"); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (claims waived for insufficient argument on appeal). Because Rimer raised his motion to sever his trial from McMonigal's before trial and again moved to sever during trial, we presume Rimer has preserved this claim properly, even though it is not entirely clear he was renewing his pretrial motion. Moreover, because the issue was raised on the nineteenth day of trial, we only review evidence that was before the court at that time. *See Van Winkle*, 186 Ariz. at 339, 922 P.2d at 304 (denial of motion to sever reviewed "in light of the evidence then before the court").

McMonigal was presented at the joint trial, such as "a number of police calls to McMonigal's address because of neighbor complaints."[3]

¶7 These arguments, however, do not demonstrate "a compelling danger of prejudice against which the trial court can not protect." *Van Winkle*, 186 Ariz. at 339, 922 P.2d at 304. First, Rimer's assertion that J.F., W.H., and L.K. would not have testified at his trial had he been tried separately is incorrect. Rimer was indicted for offenses against L.K. and therefore she would have testified in his severed trial. *See id.* at 340, 922 P.2d at 305 ("[S]everance is not required when the evidence on which a claim of rub-off relies would be admissible in a separate trial."). The same is true for J.F. and W.H. because both were involved in and testified about the criminal enterprise operated by Rimer and McMonigal. Although they also testified about specific offenses committed only by McMonigal, such evidence "generally does not constitute sufficient grounds for severance." *Id.* at 339, 922 P.2d at 304. Moreover, even though McMonigal's assault of M.K. was similar to those on the other women, M.K. testified that McMonigal was not present during Rimer's assault, nor did Rimer's assault include

[3]Rimer also contends that transcripts and recordings of telephone calls made by McMonigal introduced at trial contained "incriminating statements about [Rimer] and otherwise linked [him] to McMonigal's alleged efforts to tamper with witnesses," which "deprived [Rimer] of his right to confront and cross-examine." However, because Rimer has failed to cite to the record in support of this argument or to develop it adequately on appeal, it is waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *Bolton*, 182 Ariz. at 298, 896 P.2d at 838. In any event, as the state points out, McMonigal's telephone calls did not prejudice or incriminate Rimer because the trial court ordered references to Rimer redacted and Rimer's counsel indicated she did not object to the admission of the redacted telephone calls.

any of McMonigal's "modus operandi" such as using a taser or taking her clothing. Furthermore, Rimer has failed to explain how he was prejudiced by allegations that McMonigal and a witness were winking at each other or evidence of neighbor complaints regarding McMonigal.[4]

¶8 In addition, as the state points out, the trial court instructed the jury to consider the evidence as to the charges against each defendant separately. Because the jury was so instructed, it "is presumed to have considered the evidence against each defendant separately in finding both guilty." *State v. Murray*, 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995). Accordingly, Rimer has failed to demonstrate the court abused its discretion in denying his motion to sever his trial from McMonigal's.

Sufficiency of the Evidence as to Count One

¶9 Rimer next argues there was insufficient evidence supporting his conviction for conducting a criminal enterprise, contending that although there was overwhelming evidence against McMonigal, "[t]he only evidence linking [Rimer] to McMonigal's conduct" were his brief stays at McMonigal's residence, the fact that police officers had found him there sleeping, and forensic testimony inconclusively linking his DNA to a

[4]Rimer's conclusory allegations of McMonigal's "antics" and "constant admonitions and criticisms . . . directed to [his] attorney" similarly do not convince us that the trial court abused its discretion in denying his motion to sever. And Rimer himself was chastised by the court for "horsing around, making faces, and clowning around." Likewise, Rimer has not explained how he was prejudiced by the court's statement to his trial counsel that he would stop her questioning of a witness if she was "spending a lot of time on . . . gratuitous" questions concerning McMonigal's conduct.

weapon located in a stolen truck. He maintains this evidence "is entirely insufficient to connect [him] with the criminal enterprise conducted by" McMonigal.

¶10 "Our review of the sufficiency of the evidence is limited to whether substantial evidence supports the verdict." *State v. Sharma*, 216 Ariz. 292, ¶ 7, 165 P.3d 693, 695 (App. 2007). "Substantial evidence is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *Id.*, *quoting State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). In order to sustain Rimer's conviction for illegally conducting an enterprise, there must be substantial evidence that he was "employed by or associated with [the] enterprise and . . . participate[d] directly or indirectly in the conduct of [the] enterprise that [he knew was] being conducted through racketeering." A.R.S. § 13-2312(B).[5]

¶11 The record reflects that substantial evidence was presented at trial to support Rimer's conviction. In addition to the evidence listed above, testimony at trial established Rimer disposed of a quantity of methamphetamine when he and McMonigal believed there were police officers outside McMonigal's trailer, which then had to be replaced in order to continue the enterprise's drug sales. L.K. testified she "play[ed] the hostess" during drug transactions at the residence and had sex with Mexican drug suppliers in order to supply methamphetamine for the business. When her behavior displeased McMonigal or Rimer, she was punished by not being allowed to leave the residence, being "smacked around," "ta[s]ed," and twice by having her head shaved.

[5]Rimer does not contest that racketeering was taking place out of the trailer, only the sufficiency of the evidence connecting him to it.

¶12 On one of these occasions, Rimer forcibly shaved a patch of L.K's hair on the front part of her head while McMonigal watched. On another occasion, Rimer decided to punish her by shaving her entire head, but because the clippers broke, he instead cut her hair, took her cellular telephone away from her, and then made her get out of his car in the middle of a road and drove away. Another time, McMonigal and Rimer took L.K.'s jewelry, cash, and cell phone and then Rimer took her to a parking lot, ordered her out of the car, and left her there. Based on L.K.'s role in the criminal enterprise, as well as other evidence of McMonigal's and Rimer's coercive use of L.K. and the other women to further their activities, we disagree with Rimer's assertion that this evidence does not support his conviction.

¶13 Evidence at trial also established that Rimer helped kidnap M.K. and then raped her. M.K. had been stealing vehicles and selling them to McMonigal. On one occasion, McMonigal believed M.K. had helped L.K. escape from the residence, and M.K. also had yet to return to the residence with another stolen car she was planning to sell to McMonigal. After intercepting M.K. near her home and, at gunpoint, forcibly taking her and the stolen car to the residence, McMonigal took her clothes, tried unsuccessfully to shave her head, and "tased" her. He then raped her, and afterwards directed Rimer to rape her, which he did. Although Rimer contends his convictions for kidnapping and assaulting M.K. "do not relate to [his] participation in McMonigal's criminal enterprise," the full context of this evidence demonstrates otherwise.

¶14 In addition, Rimer used a stolen truck after obtaining the keys from the trailer and, as mentioned earlier, a gun found in the truck bore DNA consistent with Rimer's. The state also points to a note Rimer wrote to McMonigal during trial in an effort to coach McMonigal's testimony. We conclude the record contains substantial evidence to support Rimer's conviction for illegally conducting an enterprise.

Denial of Motion for New Trial

¶15 In his final argument, Rimer argues the trial court committed reversible error by denying his motion for a new trial based on prosecutorial misconduct, claiming the prosecutor "argued facts not in evidence" when discussing in closing arguments how M.K. had escaped from the residence after being raped by McMonigal and Rimer. The state points out, however, that by failing to object at trial and instead raising this issue for the first time in a motion for a new trial, Rimer has waived this issue for all but fundamental error. *See State v. Pandeli*, 215 Ariz. 514, ¶ 7, 161 P.3d 557, 564 (2007) (issue reviewed for fundamental error only when raised for first time in motion for new trial); *State v. Far West Water & Sewer Inc.*, 224 Ariz. 173, ¶ 90, 228 P.3d 909, 933 (App. 2010) (same). In order to be entitled to relief for such error, the defendant must not only establish that the error was fundamental in nature, that is "'error going to the foundation of the case,' but also that the error caused him prejudice." *Pandeli*, 215 Ariz. 514, ¶ 7, 161 P.3d at 564, *quoting State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005).

¶16 In his reply brief, Rimer contends he properly preserved this issue for appeal, arguing no trial objection was required because the prosecutorial misconduct occurred during rebuttal closing arguments. He cites no authority in support of this proposition, nor are we aware of any. *Cf. State v. Denny*, 119 Ariz. 131, 134, 579 P.2d 1101, 1104 (1978) ("opposing counsel must timely object to any erroneous or improper statements made during closing argument or waive his right to the objection" except for fundamental error); *see also State v. Goldsmith*, 112 Ariz. 399, 401, 542 P.2d 1098, 1100 (1975) ("The reason for the rule that objections must first be argued at trial is to provide the trial judge with an opportunity to remedy any errors."). In any event, because Rimer has failed to argue that the alleged error here was fundamental, and because we find no error that can be so characterized, the argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on appeal); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it).

Disposition

¶17 For the foregoing reasons, Rimer's convictions and sentences are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge